

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Robert Pitofsky, Chairman**
 Sheila F. Anthony
 Mozelle W. Thompson
 Orson Swindle
 Thomas B. Leary

In the Matter of

FMC Corporation,
a corporation.

Docket No. C-
DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of Respondent, FMC Corporation, and Respondent having been furnished thereafter with a copy of the draft of Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), containing an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that respondent has violated the said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings and issues the following Order:

1. Proposed Respondent FMC Corporation is a corporation organized and existing under the laws of the State of Delaware, with its office and principal place of business located at 200 East Randolph Drive, Chicago, Illinois 60601.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Decision and Order, the following definitions shall apply:

- A. “FMC” or “Respondent” means FMC Corporation, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by FMC Corporation; and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Commission” means the Federal Trade Commission.
- C. “MCC” means microcrystalline cellulose, and includes any product consisting in whole or in part of microcrystalline cellulose.
- D. “Producer of MCC” means any person, firm, company, corporation, partnership, joint venture, or other entity that produces or manufactures microcrystalline cellulose. The term Producer of MCC shall include Asahi Chemical. The term Producer of MCC shall not include an entity that only purchases MCC for resale, or for use as an input in the production of another product (*e.g.*, an aspirin tablet), provided that such entity does not also produce or manufacture microcrystalline cellulose.

- E. “Excipient” means an inert or inactive substance used in the production of pharmaceutical products or other tablets, including without limitation any product used as a binder, disintegrant, or super disintegrant. The term Excipient shall include MCC.
- F. “Asahi Chemical” means Asahi Chemical Industry Co., Ltd., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Asahi Chemical Industry Co., Ltd.; and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- G. “FMC Employee” means any employee of FMC with direct or indirect responsibility for the pricing, marketing, or sale of MCC. The term FMC Employee shall include all officers of FMC Corporation.
- H. “License” means a written agreement between Respondent and a Producer of MCC other than Asahi Chemical that provides for the license, cross-license, or other transfer of intellectual property that is protected by patent, copyright, and/or trade secret law and that is related to MCC.
- I. “Joint Venture Agreement” means a written agreement between Respondent and a Producer of MCC other than Asahi Chemical that provides that the parties to the agreement shall collaborate in the production or distribution of MCC, or shall collaborate in the performance of research and development relating to MCC.
- J. “Avicel Asia Pacific” means Avicel Asia Pacific, Ltd., a corporation organized and existing under the laws of Hong Kong with its office and principal place of business located at Suite 2401-02 Central Plaza, 18 Harbour Road, Wanchai, Hong Kong.
- K. “Written Communication” means any non-oral statement, information, comment, question, or answer, and includes any letter, memorandum, fax, or electronic mail.
- L. “United States” means the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, and all territories, dependencies, and possessions of the United States of America.

II.

IT IS FURTHER ORDERED that Respondent shall cease and desist from, directly, indirectly, or through any corporate or other device, in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, inviting, entering into or attempting to enter into,

organizing or attempting to organize, implementing or attempting to implement, continuing or attempting to continue, soliciting, or otherwise facilitating any combination, agreement, or understanding, either express or implied, with any Producer of MCC to allocate or divide markets, customers, contracts, lines of commerce, or geographic territories in connection with the sale of MCC.

III.

IT IS FURTHER ORDERED that Respondent shall cease and desist from, directly, indirectly, or through any corporate or other device, in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, inviting, entering into or attempting to enter into, implementing or attempting to implement, continuing or attempting to continue, soliciting, or otherwise facilitating any combination, agreement, or understanding, either express or implied, with any Producer of MCC that such Producer of MCC shall refrain in whole or in part from producing, selling, or marketing MCC.

IV.

IT IS FURTHER ORDERED that:

A. For a period of ten (10) years after the date on which this Decision and Order becomes final, Respondent shall cease and desist from, directly, indirectly, or through any corporate or other device, in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, inviting, entering into or attempting to enter into, implementing or attempting to implement, continuing or attempting to continue, soliciting, or otherwise facilitating any combination, agreement, or understanding, either express or implied, that Respondent shall distribute, sell, merchandise or otherwise market in the United States MCC produced by any Producer of MCC other than Respondent.

B. For a period of five (5) years after the date on which this Decision and Order becomes final, Respondent shall cease and desist from, directly, indirectly, or through any corporate or other device, in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, inviting, entering into or attempting to enter into, implementing or attempting to implement, continuing or attempting to continue, soliciting, or otherwise facilitating any combination, agreement, or understanding, either express or implied, that Respondent shall distribute, sell, merchandise or otherwise market in the United States any Excipient produced by Asahi Chemical.

V.

IT IS FURTHER ORDERED that:

A. It shall not, of itself, constitute a violation of Paragraph II. or Paragraph III. of this Decision and Order for Respondent to enter into, attempt to enter into, or comply with a written agreement that is reasonably related to a lawful License or lawful Joint Venture Agreement and that is reasonably necessary to achieve its procompetitive benefits.

B. It shall not, of itself, constitute a violation of Paragraph II. or Paragraph III. of this Decision and Order for Respondent to enter into, attempt to enter into, or comply with a written agreement that: (1) licenses a Producer of MCC to use, on an exclusive or non-exclusive basis and in any geographic area, any trademark owned by Respondent and to prohibit such licensee concurrently from utilizing any trademark that is confusingly similar to the licensed trademark owned by Respondent, and/or (2) authorizes a Producer of MCC to distribute outside of the United States, on an exclusive or non-exclusive basis, MCC produced by Respondent and to prohibit such distributor from reselling such MCC produced by Respondent into the United States.

C. It shall not, of itself, constitute a violation of Paragraph II. or Paragraph III. of this Decision and Order for Respondent to threaten, initiate, or settle litigation to protect its intellectual property that is protected by patent, copyright, trademark, and/or trade secret law, provided that there is a reasonable basis in law and in fact for the claims alleged by Respondent in such litigation.

D. It shall not, of itself, constitute a violation of Paragraph IV. of this Decision and Order for Respondent to enter into, attempt to enter into, or comply with an agreement to purchase and re-sell, on a temporary basis, any grade of MCC produced by both Respondent and an entity other than Respondent, provided that Respondent's production of such grade of MCC is insufficient to meet actual or forecast demand due to plant closure, governmental action, health or safety hazards, a mechanical failure or a failure in the chemical reaction process in Respondent's production facility, Act of God, or Force Majeure.

E. It shall not, of itself, constitute a violation of Paragraph IV. of this Decision and Order for Respondent to enter into, attempt to enter into, or comply with an agreement to distribute, sell, merchandise or otherwise market, for use by customers in food products only, MCC produced by an entity other than Respondent (hereinafter referred to as a "Distribution Agreement"). Provided, however, that for a period of ten (10) years after the date on which this Decision and Order becomes final, this exclusion shall not apply to any agreement that authorizes Respondent to distribute, sell, merchandise or otherwise market MCC for use in pharmaceutical products or

other tablets.

F. It shall not, of itself, constitute a violation of Paragraph IV. of this Decision and Order for Respondent to purchase from Asahi Chemical MCC meeting the current specifications of Ceolus, Grade KG-801, as set forth in confidential Exhibit A, attached to this Decision and Order, and to re-sell such product to the single customer identified in confidential Exhibit B, attached to this Decision and Order.

G. It shall not, of itself, constitute a violation of Paragraph II. or Paragraph III. of this Decision and Order for Respondent to enter into, attempt to enter into, or comply with a written Distribution Agreement providing FMC with the right to be an MCC producer's sole or exclusive re-seller of MCC for use by customers in food products only. Provided, however, that for a period of ten (10) years after the date on which this Decision and Order becomes final, this exclusion shall not apply to any agreement that authorizes Respondent to distribute, sell, merchandise or otherwise market MCC for use in pharmaceutical products or other tablets.

H. Where, pursuant to a lawful Joint Venture Agreement, FMC and a Producer of MCC other than Asahi Chemical collaborate in the creation of new MCC manufacturing capacity, it shall not, of itself, constitute a violation of Paragraph II., Paragraph III., or Paragraph IV. of this Decision and Order for Respondent to enter into, attempt to enter into, or comply with a written agreement to distribute, sell, merchandise or otherwise market, on an exclusive or non-exclusive basis, the MCC that is the output of such new manufacturing capacity.

I. In any action by the Commission alleging violations of this Decision and Order, Respondent shall bear the burden of proof in demonstrating that its conduct satisfies the conditions of Paragraph(s) V.A., V.B., V.C., V.D., V.E., V.F., V.G. and/or V.H. of this Decision and Order.

VI.

IT IS FURTHER ORDERED that for a period of six (6) years after the date on which this Decision and Order becomes final:

A. Respondent shall require that when an FMC Employee engages in any Written Communication with an employee of any other Producer of MCC relating to the pricing, marketing, or sale of MCC, a copy of such Written Communication shall be sent to an attorney from the Office of the General Counsel of FMC for review. A copy of such Written Communication shall be retained by Respondent for a period of three (3) years, and shall upon request be made available to the Commission's representative pursuant to Paragraph IX of this Decision and Order.

B. The requirements of Paragraph VI.A. shall not apply to any Written Communication between an FMC Employee and an employee of Asahi Chemical relating exclusively to the operations of Avicel Asia Pacific.

VII.

IT IS FURTHER ORDERED that:

A. Within sixty (60) days after the date this Decision and Order becomes final, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which that Respondent has complied and is complying with this order.

B. One (1) year after the date this Decision and Order becomes final, annually for the next nine (9) years on the anniversary of the date this Decision and Order becomes final, and at other times as the Commission may require, Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Decision and Order.

C. Respondent shall file with the Commission, within thirty (30) days after its effective date: (1) a copy of each written agreement entered into by Respondent and Asahi Chemical that relates to Excipients, (2) a copy of each License or Joint Venture Agreement that relates to MCC, and (3) a copy of each written agreement between Respondent and a Producer of MCC that is ancillary or related to a License or Joint Venture Agreement.

VIII.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of the order.

IX.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this order, upon written request, Respondent shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to all facilities and access to

inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondent relating to any matters contained in this Decision and Order; and

B. Upon five days' notice to Respondent and without restraint or interference from it, to interview officers, directors, or employees of Respondent.

X.

IT IS FURTHER ORDERED that Respondent shall:

A. Within thirty (30) days after the date on which this Decision and Order becomes final, send by first class mail a copy of this Decision and Order to all directors, officers, and management employees with responsibility for the pricing, marketing or sale of MCC (hereinafter referred to as "Management Employees");

B. Mail by first class mail a copy of this Decision and Order to each person who becomes a director, officer, or Management Employee, within thirty (30) days of the commencement of such person's employment or affiliation with Respondent; and

C. Require each of their directors, officers, and Management Employees to sign and submit to Respondent within thirty (30) days of the receipt thereof a statement that: (1) acknowledges receipt of the Decision and Order; (2) represents that the undersigned has read and understands the Decision and Order; and (3) acknowledges that the undersigned has been advised and understands that non-compliance with the order may subject FMC Corporation to penalties for violation of the order.

XI.

IT IS FURTHER ORDERED that this Decision and Order shall terminate twenty (20) years after the date on which it is issued, except as otherwise provided in this Decision and Order.

By the Commission.

Donald S. Clark
Secretary

SEAL
ISSUED:

Confidential Exhibits A and B

[Redacted From Public Record Version]